(32,240)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 673

ED. W. HOPKINS, ASSESSOR OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA; E. M. ROSS, DEPUTY ASSESSOR, ETC.; W. O. WELCH, TAX COLLECTOR, ETC., ET AL., PETITIONERS,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fols. 1 & 2]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA

No. J 16 N. In Equity

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a Corporation, and The Pacific Telephone and Telegraph Company, a Corporation, Plaintiffs,

vs.

Ed W. Hopkins, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a Body Corporate and Politic, Defendants

Citation, in usual form, showing service on Edward T. Bishop et al., filed March 11, 1926, omitted in printing.

[fol. 3] IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed July 17, 1925

The above named plaintiffs, as their bill of complaint against the above named defendants, allege as follows:

[fol. 4] I

That at all times herein mentioned each plaintiff was and is now a corporation organized and existing under the laws of the State of California.

II

That at all of said times the defendants Ed W. Hopkins, F. M. Ross, W. O. Welch and H. A. Payne were and are now, respectively, duly qualified and acting assessor, dep-

uty assessor, tax collector and auditor of the defendant County of Los Angeles, State of California.

III

That at all of said times the defendant County of Los Angeles was and now is a county of the State of California and as such a body corporate and politic duly organized and existing under the laws of said state.

IV

That this is a suit of a civil nature in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.), and arises under the Constitution of the United States.

V

That the plaintiff The Pacific Telephone and Telegraph Company is now, and for many years last past has been, authorized and empowered by its Articles of Incorporation, to do a general telephone and telegraph business, and that as such corporation it has constructed and established, and now maintains and operates, and has maintained and [fol. 5] operated for many years last past, extensive telephone and telegraph lines and systems and apparatus and appliances, for the purpose of transmitting messages and intelligence by electricity, in the states of California (including the County of Los Angeles), Oregon, Washington and Idaho; that said plaintiff now, and for many years last past in the transaction of its said business, and as a part thereof, transmits and delivers, and has transmitted and delivered, by means of its said lines and systems and telegraphic and telephonic instruments and apparatus connected therewith, messages and communications originating at points and places in the United States outside of the State of California, and transmitted by and over its said lines to points and places within said County of Los Angeles, and to other points within said State of California, and also in like manner and by like means transmits, and has transmitted for many years last past, like messages and

communications originating at points and places within said County of Los Angeles, and elsewhere within the said State of California, to points and places in other states of the United States, and also in like manner and by like means transmits and delivers, and at all said times has transmitted and delivered, messages and communications originating within the said County of Los Angeles and at other points within the State of California and other places within said state; that at all of said times the plaintiff Southern California Telephone Company was and is now authorized and empowered by its Articles of Incorporation to do a like business, and said plaintiff has at all of said (fol. 6) times maintained and operated, and now maintains and operates, like telephone and telegraph lines and systems in said County of Los Angeles, and has likewise transmitted and delivered at all of said times, and now transmits and delivers, like messages and communications to and from said County of Los Angeles, and other parts of the United States, both within and without the State of California; that said lines and systems of the two plaintiffs connect, and plaintiffs by means thereof supply telegraph service and the greater part of the public telephone service rendered in said County of Los Angeles, the plaintiff Southern California Telephone Company operating for the most part in the City of Los Angeles therein, and the plaintiff The Pacific Telephone and Telegraph Company operating elsewhere in said county; that at all times herein mentioned both plaintiffs were and are now public service corporations, and both plaintiffs are threatened with similar great irreparable and immediate loss, damage and injury by the threatened acts of the defendants hereinafter set forth.

VI

That as part of their said respective lines and systems and businesses plaintiffs now maintain and operate in said County of Los Angeles upwards of three hundred thousand telephone instruments; that each of said instruments consists of a receiver, transmitter and induction coil (collectively termed by said defendants a "telephone talking set," as hereinafter appears) and a stand or body and the

[fol. 7] wiring and other apparatus associated therewith; that the so-called "talking set" is an integral part of each said instrument, which cannot be used for the transmission of messages or intelligence without it; that said "talking sets" are indispensably necessary to the operation of the said respective lines, systems and businesses of the respective plaintiffs.

VII

That at all times herein mentioned, all the "talking sets" used by plaintiffs in said County of Los Angeles in connection with their respective lines, systems and businesses were and are now owned by American Telephone and Telegraph Company, a New York corporation, and were at all of said times, and are now, leased by said American Telephone and Telegraph Company to said respective plaintiffs; that the stands or bodies and other parts of said instruments were at all of said times, and are now, owned by plaintiffs.

VIII

That heretofore and on or about the 29th day of April, 1925, the defendant Ed W. Hopkins, purporting to act as such assessor of said County of Los Angeles, addressed to said American Telephone and Telegraph Company a certain notice as follows:

[fol. 8] "207607. Form 10-A. E. W. H. May 4, 1925.

Please return notice.

Office of County Assessor, Ed. W. Hopkins, Assessor, Hall of Records, Los Angeles, Cal.

4-29, 1925.

American Telephone and Telegraph Co., New York City, N. Y.:

You are hereby notified that taxable Personal Property belonging to you located at L. A. Tax Dis #1 308280 Telephone Talking Sets @ 5.00 County of Los Angeles, State of California, has been assessed for the fiscal year 1925, at the valuation of $1,541,000.

Amount of Tax, $57,017.00.

The same is now due and payable to the Assessor in accordance with the law.

Yours respectfully, Ed W. Hopkins, County Assessor, by B., Deputy.

Sec. 3820. The Assessor must collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property, sufficient to secure the payment of the taxes.

Sec. 3756. The taxes on all personal property unsecured by real property shall be due and payable immediately after the assessment of said personal property is made.

[fol. 9] Sec. 3821. * * * the Assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed.

Escaped assessment in 1924. Assessed double in 1925 as per Sec. 3649 P. C."

That thereafter, and on or about June 12, 1925, said defendant, purporting to act as such assessor, addressed to said company a second notice, as follows:

"207,697. Please return notice. Delinquent After 6-12, 1925.

Office of County Assessor, Ed. W. Hopkins, Assessor, Hall of Records, Los Angeles, Cal.

6-12, 1925.

American Telephone and Telegraph Co., New York City, New York:

On 5-29-25 you were notified that there was a tax due from you as follows: Tax $57,017.00.

At the same time you were given all possible information regarding the matter, but no reply has been received by this office.

This tax is due and payable now, and you are requested to forward same at once.

Yours respectfully, Ed W. Hopkins, County Assessor, by B., deputy."

Form 11. E. W. H. MD.

[fol. 10] IX

That the pretended tax thus stated to have been assessed against the "telephone talking sets" mentioned in said notice dated April 29, 1925, has not been paid, and that the defendants herein, pretending to act in pursuance of sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793, of the Political Code of the State of California, have threatened and still threaten to seize and sell forthwith so many of said "telephone talking sets" as may be necessary to satisfy said pretended tax; that on or about the 8th day of July, 1925, the defendants, by the defendants Ed. W. Hopkins and F. Ross, sent to Oscar Lawler and to Alfred Sutro, attorneys, respectively, for the plaintiff Southern California Telephone Company and The Pacific Telephone and Telegraph Company, the following communication:

"County of Los Angeles

Ed. W. Hopkins, Assessor. E. O. Weed, Chief Deputy

Los Angeles, California, July 8, 1925.

American Telephone & Telegraph Co. c/o Oscar Lawler, 800 Standard Oil Building, Los Angeles, California.

GENTLEMEN: I, Ed W. Hopkins, Assessor of the County of Los Angeles, State of California, have levied an assessment in the sum of $1,427,331.00 upon the receivers, transmitters and induction coils belonging to you and situate in [fol. 11] the County of Los Angeles. A tax of $52,224.45 was due immediately upon the assessment of said property. This tax has not been paid and is now delinquent. If it is not paid immediately I will proceed in pursuance of sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code to collect same by seizing and selling so much of said property as is necessary to satisfy the tax.

We are again transmitting herewith the notices previously left with you which set forth the quantities, location, valuation and amount of the tax levied.

Yours very truly, Ed W. Hopkins, County Assessor, by F. M. Ross, Deputy.

Copy to Alfred Sutro, Union Oil Bldg., San Francisco, California."

X

That on the first Monday in March, 1925, all the "talking sets" mentioned in said notice dated April 29, 1925 (these being the same property as the receivers, transmitters and induction coils mentioned in said notice dated July 8, 1925), were, ever since have been, and now are, operative property of the respective plaintiffs herein, that is to say, property used exclusively in the conduct of their said respective businesses in said State of California; that on or about the 12th day of March, 1925, in accordance with law, plaintiff Southern California Telephone Company [fol. 12] and plaintiff The Pacific Telephone and Telegraph Company, respectively, duly filed with the State Board of Equalization reports in the form and within the time prescribed by law, showing in detail for the year ending December 31, 1924, among other things, all their respective property in said state coming under the definition of "Operative Property" in Section 3665-B of the Political Code of the State of California, and plaintiffs included in said reports as such operative property all of the telephone instruments which were on said 31st day of December, 1924, located in said County of Los Angeles, which instruments included, as integral parts thereof, all the "talking sets" mentioned in said notices which were located in said County of Los Angeles on said day; that said plaintiffs thereafter and on or about the 15th day of June, 1925, each filed an amended report with said Board, including therein as such operative property of the respective plaintiffs all telephone instruments then located in the County of Los Angeles, and including, as aforesaid, all "talking sets" mentioned in said notices and located in said county on said day; that each plaintiff, in accordance with law, duly furnished a duplicate of its said respective report and of its said amended report, covering so much of its said property as was located in the County of Los Angeles, to defendant Ed W. Hopkins, as such assessor; and that said defendant, as such assessor, did not, nor did any of the other defendants, notify the State Board of Equalization that said [fol. 13] "talking sets," or any thereof, so included by plaintiffs in their said respective reports, were not operative property of the respective plaintiffs.

XI

That pursuant to Section 14 of Article XIII of the Constitution of the State of California, the taxes upon all the "talking sets" in said notices mentioned were, on the first Monday in March, 1925, ever since have been, and now are, entirely and exclusively for state purposes, and required to be levied, assessed and collected in the manner in said section provided; that pursuant to said section and the laws of the State of California passed to carry the same into effect, taxes have been levied upon the gross receipts of the respective plaintiffs from their respective operations during the year ending December 31, 1924, within said state, and plaintiffs are now, and at all times have been, ready, willing and able to pay the same within the time allowed by law, and said taxes, pursuant to said section, are in lieu of all other taxes and licenses, state and municipal, upon the operative property of plaintiffs, including said "talking sets," and all of them; that said "talking sets" did not, nor did any of them, "escape assessment" in 1924 (as alleged in said notice dated April 29, 1925), but, on the contrary, all of the same which were, on the first Monday in March, 1924, located in said County of Los Angeles were then operative property of one or the other of plaintiffs as aforesaid, and that the taxes thereon, under said Section 14 of Article XIII, then were on said first Monday in March, [fol.14] 1924, ever since have been and now are, entirely and exclusively for state purposes; that each of the plaintiffs paid state taxes, as required by law, upon its gross receipts from its operations within said state for the year ending December 31, 1923, which said taxes, under said section, were in lieu of all other taxes and licenses, state and municipal, upon the operative property of plaintiffs, including all of said "talking sets," located in Los Angeles County on the first Monday in March, 1924; that the pretended tax or assessment mentioned in said notices is unlawful and wholly void.

XII

That the laws of the State of California contain no provision whereby plaintiffs, or either of them, could pay the pretended tax upon said "talking sets," or any part thereof, under protest, and thereafter bring suit to recover the same,

nor could plaintiffs, or either of them, under said laws, even if such recovery were possible, recover any interest thereon.

XIII

That the threatened seizure and sale by defendants of said "talking sets," or enough thereof to satisfy said pretended tax, would disrupt and paralyze the respective telephone services of both plaintiffs within said County of Los Angeles, and would cut off all telephone communication over the lines or systems of both plaintiffs between said said county and all other parts of the United States, preventing, among other things the transmission of interstate messages, and otherwise causing great inconvenience to the [fol. 15] patrons of plaintiffs and to the public; that such threatened seizure and sale would deprive plaintiffs of the use of all their lines and systems within said county, and of their revenues therefrom, and subject plaintiffs to *to* the risk of numerous damage suits by patrons whose service had thus been interfered with or cut off; that the consequent loss, damage and injury to each plaintiff, from such seizure and sale, would be immediate and irreparable and would greatly exceed the sum of three thousand dollars ($3,000.).

XIV

That, for the reasons aforesaid, such threatened seizure and sale would deprive each plaintiff of its right and privilege to transmit messages between said county and other places in the United States, and would deprive each plaintiff of its property without due process of law, and deny to each plaintiff the equal protection of the laws, and is and would be in violation of the rights, privileges and immunities of each plaintiff under the Constitution of the United States, and particularly under subsection 3 of section 8 of Article I thereof, and of the Fourteenth Amendment thereto.

XV

That sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code of the State of California, in so far as the same, or any of them, purport to authorize said threat-

ened seizure and sale, are contray to and in violation of the Constitution of the United States, particularly subsection 3 [fol. 16] of section 8 of Article I thereof, and of the Fourteenth Amendment thereto, and said sections are, and each of them is, to that extent, unconstitutional and void.

XVI

That, for the reasons herein alleged, said pretended tax upon said "talking sets" is wholly void and is not owing in whole or in part to the defendants, or any of them; but plaintiffs nevertheless hereby offer, in the event that said tax, or any part thereof, should be held valid, to pay the same at once, and they aver that they are financially able to pay said tax.

XVII

That immediate and irreparable injury, loss and damage will result before notice can be served and a hearing had upon plaintiffs' application for a temporary restraining order as hereinafter prayed, for the reasons hereinbefore stated, and for the further reason, as plaintiffs are informed and believe and so allege, that if notice were given to defendants of said application for a temporary restraining order, defendants, or some of them, would thereupon immediately proceed to seize and sell said "talking sets" to satisfy said pretended tax thereon, as a result of which plaintiffs would suffer great and irreparable injury, loss and damage, as above alleged.

XVIII

That plaintiffs have no plain, speedy or adequate remedy at law, and can have relief only in a court of equity where matters of this kind are properly cognizable; that this is a [fol. 17] case in equity within the jurisdiction of this Honorable Court.

Wherefore, inasmuch as plaintiffs can have no adequate relief, except in this court, and to the end therefor- that the defendants may, if they can, show why plaintiffs should not have the relief herein prayed, and a full, true, direct and perfect answer make to the matters herein stated and

charged, but not under oath (answer under oath being hereby expressly waived), plaintiffs pray:

1. That this Honorable Court grant unto them a writ of subpœna ad respondendum, issuing out of and over the seal of this Honorable Court and directed to said defendants, commanding them and each of them on a certain day and under a certain penalty therein to be inserted, to appear in this Honorable Court and then and there make full, direct, true and perfect answers to all and singular the premises, but not under oath (answer under oath being hereby expressly waived), and further to stand, do, perform and abide by such order and decree as to this Honorable Court may seem meet.

2. That it be adjudged and decreed that the aforesaid pretended tax of fifty-seven thousand and seventeen dollars ($57,017.) is unlawful and wholly void.

3. That it be adjudged and decreed that said threatened sale and seizure of said "talking sets" would be in violation of the Constitution of the United States and of the rights, privileges and immunities of plaintiffs thereunder.

[fol. 18] 4. That it be adjudged and decreed that plaintiffs be granted a writ of injunction issuing out of and over the seal of this Honorable Court against defendants, and each and all of them, and against all persons acting by or under the authority of defendants or any of them, as officers, agents, deputies, servants, employees, or otherwise, perpetually enjoining and restraining them, and each of them, from seizing or selling, or attempting to seize or sell, said "talking sets," or any of them, to collect or satisfy said pretended tax, or otherwise for such purpose molesting or interfering with the same, or with the telephone instruments, or any thereof, of which, as aforesaid, said "talking sets" are integral parts.

5. That upon the filing of this bill of complaint this court make its order directed to said defendants commanding them, and each of them, to be and appear before this Honorable Court at a time and place therein to be designated, then and there to show cause, if any they have, why this Honorable Court should not enjoin them, and each of them, their officers, agents, deputies, servants and employees from

the acts aforesaid, pending the final determination of this cause, and that in and by said order to show cause this court make its temporary restraining order restraining said defendants, and each of them, their officers, agents, deputies, servants and employees from said acts until the hearing and determination of said order to show cause; and that upon the hearing of such order to show cause this Honorable Court grant the plaintiffs their preliminary injunction re- [fol. 19] straining said defendants, their officers, agents, deputies, servants and employees as herein prayed, pending the final hearing and determination of this cause.

6. That if at any time hereafter, and prior to the final hearing hereof, any person shall attempt to seize or sell said "talking sets," or any thereof, to collect or satisfy said pretended tax, or otherwise under color of said pretended tax, or pretense of collecting or satisfying the same, molest or interfere with the said "talking sets," or with the instruments of which, as aforesaid, said "talking sets" are integral parts, such person or persons, or some of them in behalf of all, be made parties defendant herein, and each of them be enjoined and restrained as hereinabove prayed, and that plaintiffs be granted their costs of suit and such further and other relief in the premises as to the court shall seem meet, and the nature of the case require.

Lawler & Degnan, Attorneys for Plaintiff.

Duly sworn to by H. D. Pillsbury. Jurat omitted in printing.

[fol. 20] [File endorsement omitted.]

In United States District Court

Amendment to Bill of Complaint—Filed October 26, 1925

Now come the plaintiffs above named and by leave of the court first had and obtained file this their amendment to their bill of complaint herein, and as paragraph XII A allege as follows:

The said tax of $52,224.45, in satisfaction of which, in paragraph IX of the complaint it is alleged, the defendant,

Ed W. Hopkins, as Assessor of the County of Los Angeles, [fol. 21] threatens to seize and sell the talking sets, is a tax threatened to be collected in part for the County of Los Angeles, and in part also for each of the hereinafter mentioned municipalities in the said County of Los Angeles. That each of said municipalities is a municipal corporation duly incorporated and existing under the laws of the State of California. That each of said municipalities, by ordinance heretofore duly adopted and numbered and dated respectively as hereinafter set out, has adopted the provisions of that certain act of the State of California, approved March 27, 1895, as amended, and entitled "An act to provide for the levy and collection of taxes by and for the use of municipal corporations and cities incorporated under the laws of the State of California," etc.

That the respective numbers of the ordinances and the dates of their adoption by each of said municipalities are as follows:

Municipality	Ordinance No.	Date
Glendale	343	January 2, 1919.
Burbank	71	February 20, 1914.
Watts	116	September 5, 1911.
Montebello	17	February 5, 1921.
Inglewood	168	January 29, 1914.
Huntington Park	484	December 18, 1922.
Hawthorne	20	January 22, 1923.
San Gabriel	51	December 30, 1913.
South Pasadena	373	December 9, 1912.
Vernon	39	January 27, 1910.
San Marino	7	January 22, 1914.
[fol. 22] Monterey Park	36	January 26, 1918.
El Segundo	3	January 31, 1917.
Culver City	12	January 28, 1918.
Beverly Hills	3	January 31, 1914.

Los Angeles, Ordinance No. 40302, N. S., adopted May 10, 1920, as amended by Ordinance No. 45027, N. S., adopted November 14, 1922, as amended by Ordinance No. 46057, N. S., adopted April 20, 1923.

That under the provisions of the said act of March 27, 1895, as amended, the net amount of taxes collected for a

municipal corporation, as ascertained by the provisions of said act, must be paid to the treasurer of the municipal corporation to which it respectively belongs, such payment to be made under the general requirements and penalties provided by law in the State of California for the settlement of other taxes. That under the laws of the State of California settlement must be made by a tax collector with the county treasurer on the first Monday of each month and at least once a month. That if the said tax were paid by plaintiffs, the parts thereof respectively belonging to the said respective municipalities would be paid to the same as provided by law, and if plaintiffs had any remedy by suit or action at law to recover the tax so paid, plaintiffs would be obliged to bring such a suit or action at law separately against each of said municipalities, as well as against defendants, and plaintiffs would thereby be subjected to a great multiplicity of suits. That the re- [fol. 23] spective parts of said tax so to be paid to each of said respective municipalities are considerable, but plaintiffs are unable to ascertain the exact parts of said tax which if collected from plaintiffs would be paid to each of said municipalities.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Pillsbury, Madison & Sutro, of Counsel.

Duly sworn to by H. D. Pillsbury. Jurat omitted in printing.

[fol. 24] [File endorsement omitted.]

In United States District Court

Answer—Filed August 6, 1923

Now come the defendants above named and all of them, and reserving all manner of exceptions that may be had to the uncertainties and imperfections of the Bill, and answering thereto, admit, deny and allege as follows:

I

Admit all the allegations contained in paragraph I, II, and III.

II

Answering paragraph IV of plaintiffs' complaint, deny that plaintiffs' suit arises under the Constitution of the United States or under any law or treaty thereof.

III

Answering paragraph V of plaintiffs' complaint, defendants deny that plaintiffs, or either of them, are threatened with great, irreparable, immediate or any loss, damage and or injury by the threatened or any acts of the defendants or any of them.

IV

Admit the allegations contained in paragraphs VI and VII of plaintiffs' complaint and in this connection allege [fol. 25] that the "telephone talking sets" mentioned therein are owned, maintained and kept in repair by the American Telephone and Telegraph Company, a New York Corporation; that said American Telephone and Telegraph Company is not a public utility operating within the State of California, and has paid no tax on said "telephone talking sets" either to the State of California or to the County of Los Angeles, or to any of the municipal corporations in which such property is located; that such property of said company is not exempted from local taxation by the Constitution or the laws of the State of California, and that the said tax so imposed on said property is legally and equitably due the County of Los Angeles.

V

Admit the allegations contained in paragraph VIII, of plaintiffs' complaint.

VI

Answering paragraph IX of plaintiffs' complaint defendants admit the sending of the notice therein incorporated, and admit that the tax assessed upon the American Telephone and Telegraph Company according to the provisions of the law of the State of California, has not yet been paid and here allege the true amount of said tax to be Fifty-two

Thousand Two Hundred Twenty-four and 45/100 Dollars ($52,224.45).

VII

Answering paragraph X of plaintiffs' complaint defendants deny that on the first Monday in March, 1925, or at [fol. 26] any time, the "talking sets" herein referred to, were, or now are, operative or any property of the plaintiffs' or either of them, and deny that the report filed by the plaintiffs with the State Board of Equalization for the year ending December 31, 1924, of their respective property included under the definition of "operating property" or otherwise, the "telephone talking sets" referred to herein.

VIII

Answering paragraph XI of plaintiffs' complaint, defendants deny that pursuant to Section 14 of Article XIII of the Constitution of the State of California, or at all, the taxes upon all or any of the "talking sets" were on the first Monday in March, 1925, or ever, entirely and/or exclusively or at all, for State purposes, and/or were required to be levied, assessed and collected under the provisions of law relating to the levy, assessment and collection of taxes for State purposes.

Deny that the taxes paid by plaintiffs or either of them for State purposes covered the "talking sets", or any of them.

Deny that any taxes have been paid upon said "talking sets" for the year 1925 as required by law or at all, and deny that any taxes paid by these plaintiffs or either of them to the State of California, covered the said "talking sets" or had the effect of exempting them from liability for the taxes levied thereon by the County of Los Angeles. Deny that the tax or assessment levied against said "talking sets" is unlawful and/or void.

[fol. 27] IX

Answering paragraph XII deny that the laws of the State of California contain no provision whereby plaintiffs or either of them could pay the tax upon the "talking sets" under protest and thereafter bring suit to recover the same,

but on the contrary, allege that the laws of the State of California, permit such payment and suit to recover the taxes so paid.

X

Answering paragraph XIII of plaintiffs' complaint, defendants admit that the seizure and sale of "talking sets" would cause inconvenience to the plaintiffs, but deny that such inconvenience is in legal effect in any manner different from the inconvenience caused by any other seizure and sale of property under the laws of the State of California, for failure to pay taxes thereupon duly levied and assessed; or that such inconvenience would in any way entitle plaintiffs or either of them to any remedy or relief at law, or in equity, and in this connection allege that such seizure and sale and such inconvenience can readily be obviated by plaintiffs by the payment of the taxes levied and assessed upon such "talking sets"; defendants further deny that the seizure and sale of sufficient "telephone talking sets" to cover the unpaid taxes due from defendants to the County of Los Angeles, would hinder or prevent the transmission of interstate telephone messages or would in any way interfere with interstate or foreign commerce.

[fol. 28] XI

Answering paragraph XIV of plaintiff's complaint, defendants deny that a seizure and sale of said "talking sets" would deprive plaintiffs or either of them of any property without due process of law, or deny plaintiffs or either of them, equal protection of the law, and or would be in violation of any of the rights, privileges and or immunities under said subsection 3 of Section 8 of Article I. of the Constitution of the United States, or the Fourteenth Amendment thereto, or any provision of, or amendment to the said Constitution of the United States, or would be in violation of any right, privilege and or immunity of plaintiffs or either of them under the laws or treaties of the United States or under the Constitution of the State of California, or any of the laws thereof.

XII

Answering paragraph XV of plaintiffs' complaint, defendants deny that sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code of the State of California, or any of said sections in so far as they or any of them purport to authorize the threatened seizure and sale of the said "talking sets", or at all, are, or are any of them contrary to or in violation of any portion of or amendment to the Constitution of the United States.

XIII

Answering paragraph XVI of plaintiffs' complaint, defendants deny that the tax heretofore levied by defendants on said "talking sets" is wholly or in part void, and on the contrary allege that said tax, and all thereof, is now due, [fol. 29] owing and unpaid from the American Telephone and Telegraph Company, a New York corporation, to the County of Los Angeles.

XIV

Answering paragraph XVIII of plaintiffs' complaint, defendants deny that plaintiffs have no plain, speedy or adequate remedy at law, but on the contrary allege that they, and both of them have such remedy; deny that this is a case in equity or is within the jurisdiction of this Honorable Court, but on the contrary allege that the bill of complaint does not state any matter of equity entitling plaintiffs or either of them to any relief against these defendants, or at all; defendants further allege that said bill does not state facts sufficient to entitle plaintiffs or either of them to any relief or to confer jurisdiction upon this court.

Wherefore, defendants and each of them, pray that the application of plaintiffs for a temporary or a permanent injunction against these defendants, or any of them, be denied. That the temporary restraining order heretofore issued be dissolved forthwith; that defendants and each of them be hence dismissed with their costs and for such other

and further relief as to this Honorable Court may seem meet and proper.

Edward T. Bishop, County Counsel, and J. A. Tucker, Deputy; Albert W. Leeds, Deputy, Attorneys for Defendants.

[fol. 30] [File endorsement omitted.]

In United States District Court

Notice of Motion to Dismiss—Filed October 20, 1925

To the plaintiffs in the above-entitled matter and their attorneys, Lawler and Degnan:

You and each of you will please take notice that on the 26th day of October, 1926, at the hour of 10 o'clock A. M. of said date, or as soon thereafter as said motion can be heard, in the court room of the Honorable Edward J. Henning, in the Federal Building, City of Los Angeles, State of California, defendants will move the court for an order to dismiss the bill of complaint in the above entitled action on the following grounds, to-wit:

I

That the bill of complaint does not state facts sufficient to entitle the plaintiffs, or either of them, to any relief against these defendants, or any of them, or at all.

II

That the bill of complaint does not state any facts or matter of equity entitling plaintiffs to any injunctive relief against these defendants, or at all, in that it shows on its face that there exists a plain, speedy and adequate remedy [fol. 31] of law, to-wit, the payment of the tax complained of in said bill, and an action pursuant to the statutes of California to recover the amount so paid.

III

That the bill of complaint does not state facts sufficient to confer jurisdiction upon this court.

Said motion will be based upon the bill of complaint, this notice of motion, and the records and files of this cause.

Dated Los Angeles, California, October 17, 1925.

Edward T. Bishop, County Counsel, and J. A. Tucker, Deputy County Counsel, and Albert W. Leeds, Deputy County Counsel.

[File endorsement omitted.]

In United States District Court

Motion to Dismiss—Filed October 26, 1925

Come now the defendants Ed W. Hopkins, Assessor of the County of Los Angeles, State of California, F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California, W. O. Welch, Tax Collector of the County of Los Angeles, State of Californa, H. A. Payne, Auditor of [fol. 32] the County of Los Angeles, State of California and County of Los Angeles, and move this Honorable Court to dismiss plaintiff's bill of complaint in the above entitled matter on the following grounds, to-wit:

I

That the bill of complaint does not state facts sufficient to entitle the plaintiffs, or either of them, to any relief against these defendants, or any of them, or at all.

II

That the bill of complaint does not state any facts or matter of equity entitling plaintiffs to any injunctive relief against these defendants, or at all, in that it shows on its face that there exists a plain, speedy and adequate remedy of law, to-wit: the payment of the tax complained of in said bill, and an action pursuant to the statutes of California to recover the amount so paid.

III

That the bill of complaint does not state facts sufficient to confer jurisdiction upon this court.

Wherefore these defendants pray that plaintiff's bill of complaint be dismissed and that these defendants may have a judgment of dismissal together with their costs of suit incurred herein.

Edward T. Bishop, County Counsel, and J. A. Tucker and Albert W. Leeds, Deputies County Counsel, Attorneys for Defendants.

[fols. 33-35] [File endorsement omitted.]

Bond on temporary restraining order for $5,000, approved and filed July 17, 1925, omitted in printing.

[fol. 36] In United States District Court

Order to Show Cause and Restraining Order—Filed July 17, 1925

To Ed W. Hopkins, assessor of the county of Los Angeles, State of California; F. M. Ross, deputy assessor of the county of Los Angeles, State of California; W. O. Welch, tax collector of the county of Los Angeles, State of California; H. A. Payne, auditor of the county of Los Angeles, State of California and county of Los Angeles, a body corporate and politic, the defendants above named:

Whereas in the above entitled cause it has been made to appear upon the verified complaint filed therein that a writ of injunction preliminary to the final hearing is proper, and that prima facie the plaintiffs are entitled thereto, enjoining the defendants herein from the acts complained of and threatened to be committed:

Now, upon reading and filing the complaint in said suit duly verified, and it satisfactorily appearing to me from

specific facts shown by said verified complaint that there are sufficient grounds for granting an order to show cause why an injunction should not be granted, and that immediate and irreparable injury, loss and damage will result to the plaintiffs before notice can be served and a hearing had upon said complaint, unless the defendants are restrained as hereinafter set forth pending said hearing, and that the threatened injury to plaintiffs is the threatened [fol. 37] seizure and sale by defendants, in satisfaction of an alleged personal property tax of $57,017., of certain so called "telephone talking sets," owned by American Telephone & Telegraph Company, but leased by plaintiffs, and that said injury would be irreparable because said "talking sets" are integral parts of telephone instruments operated by the respective plaintiffs, and are indispensably necessary to the operation of the telephone lines and systems of plaintiffs in the County of Los Angeles, and that the seizure or sale thereof would disrupt and paralyze said lines and systems, thus preventing the transmission of interstate and intrastate messages, depriving plaintiffs of the use of their said properties and of the revenues therefrom, exposing them to the risk of numerous damage suits and causing great damage and inconvenience to the public at large, and it further appearing from said complaint that if notice were given to the defendants of plaintiff's application for a temporary restraining order herein, defendants, or some of them, would immediately proceed to seize and sell said "talking sets" to satisfy said alleged tax, whereby plaintiffs would suffer great, immediate, and irreparable damage, as aforesaid;

It is therefore ordered that the defendants, Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California, F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California, W. O. Welch, Tax Collector of the County of Los Angeles, State of California, H. A. Payne, Auditor of the County of Los Angeles, State [fol. 38] of California, and County of Los Angeles, a body corporate and politic, appear before the United States District Court for the Southern Division of the Southern District of California, in its court room at — on Monday, the 27th day of July, 1925, at the hour of ten o'clock A. M.

of said day, or as soon thereafter as counsel can be heard, then and there to show cause, if any they have, why the preliminary injunction prayed for in said verified complaint should not issue.

And plaintiff's application for such temporary restraining order is hereby granted (without notice for the reasons aforesaid) upon their giving a bond with good and sufficient surety to be approved by the clerk of this court in the penal sum of Five Thousand dollars ($5,000.00), securing the said defendants against all loss or damage which may result from the issue of this order if it should be finally determined that the same is improperly issued.

Now, therefore, it is ordered that you, and each of you, the said Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California, F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California, W. O. Welch, Tax Collector of the County of Los Angeles, State of California, H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic, the defendants herein, your officers, agents, deputies, servants, employees and attorneys, [fol. 39] and all persons acting by or under your authority or direction, be and hereby are specially restrained and enjoined from seizing, or attempting to seize, or selling, or attempting to sell, to collect or satisfy the alleged tax of fifty-seven thousand and seventeen dollars ($57,017.) upon the so called "telephone talking sets" mentioned in said complaint, any of said "talking sets," or otherwise molesting interfering with the same, or with the telephone instruments, or any thereof, of which said "talking sets" are integral parts, pending the hearing and determination of this order to show cause.

It is further ordered that a copy of the complaint on file herein and of this order be served on each of the defendants.

Dated July 17, 1925, at 2 o'clock P. M.

Wm. P. James, Judge.

[File endorsement omitted.]

In United States District Court

Return to Order to Show Cause—Filed July 27, 1925

The defendants, and each of them, in answer to the order to show cause why the preliminary injunction prayed for in the verified complaint of plaintiff should not issue herein, now show to the court that no preliminary injunction should issue herein as prayed for or at all, for the following reasons:

[fol. 40]

I

The bill of complaint does not state facts sufficient to entitle plaintiffs to any relief against these defendants, or at all.

II

The bill of complaint does not state any matter of equity entitling plaintiffs to any relief against these defendants, or at all.

III

The bill of complaint does not state facts sufficient to confer jurisdiction upon this Court.

IV

That plaintiffs have a plain, speedy and adequate remedy at law, to-wit: the payment of the tax complained of in said bill, and an action to recover the amount so paid.

Wherefore defendants pray that the application for the preliminary injunction prayed for in the said verified bill of complaint be denied, and that the temporary restraining order heretofore issued by this Court be discharged.

Edward T. Bishop, County Counsel, by J. A. Tucker, Deputy County Counsel, and Albert W. Leeds, Deputy County Counsel.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

STIPULATION CONTINUING HEARING—Filed July 25, 1925

It is hereby stipulated and agreed between plaintiffs, and all of them, and defendants, and all of them, through their respective counsel, that the hearing upon the Order to Show Cause in the above entitled matter be continued to October 26, 1925, at the hour of 10 A. M. on said day, or as soon thereafter as the calendar of the court will permit.

It is further stipulated and agreed that the temporary restraining order heretofore isued by this Honorable Court be, and remain in full force and effect until said hearing.

It is expressly agreed that the defendants hereto do not, nor do any of them, waive or give up any rights or defenses which they, or any of them, might have had or urged at the hearing upon the above mentioned Order to Show Cause if it were heard on the date originally set in such Order.

Dated Los Angeles, California, July 24th, 1925.

Lawler & Degnan, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel, and J. R. Tucker, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed March 11, 1926

CAPTION

The above entitled cause came on regularly for hearing before the above entitled court, Hon. Edward J. Henning, presiding, on Monday, October 26, 1925, on the order to show cause why the preliminary injunction prayed for in plaintiff's bill of complaint should not issue and on the motion of defendant to dismiss plaintiff's bill of complaint. Alfred Sutro, Esq., and Messrs. Lawler & Degnan, by Oscar Lawler, Esq., appeared as counsel for the plaintiffs, and Ed-

ward T. Bishop, Esq., County Counsel of the County of Los Angeles, by J. A. Tucker, Esq., and Albert W. Leeds, Esq., appeared as counsel for the defendants. Thereupon the following testimony and evidence were presented and proceedings had.

A. J. Reed was called as a witness on behalf of the plaintiffs, and, being first duly sworn, testified on direct examination as follows:

Testimony of A. J. Reed

I am now and have been for sixteen years last past connected with the Southern California Telephone Company and The Pacific Telephone and Telegraph Company. Prior to my connection with them I was for six years with the Western Electric Company, a concern which manufactures telephone appliances on a large scale. I am familiar with telephone equipment and business.

[fol. 43] My present position is that of equipment and building engineer for the Southern California Telephone Company and for the southern division of The Pacific Telephone and Telegraph Company.

The Pacific Company operates throughout the State of California and in the States of Washington, Oregon and Idaho, and in and between those states. The Southern Company operates in Los Angeles County. The systems of the two companies are interconnected and operated as a unit.

In my capacity as equipment and building engineer I am familiar with the equipment used by the telephone companies in the transaction of their business. I prepared those portions of the reports of both plaintiffs to the State Board of Equalization in March, 1925, which dealt with property in the County of Los Angeles. I prepared like portions of the amended reports which were subsequently filed in June, 1925. These reports were made on forms prescribed and furnished by the State Board of Equalization, which came from the Secretary of the Board.

In these reports on the page numbered 5 and under heading 10 appears an item "Poles, conduits, cables, wires, instruments," etc. In the column headed "Number of in-

struments in each city, county and town," I reported the number of instruments for each of the two plaintiff companies, so far as they related to Los Angeles County, and the various municipalities and places therein. Every in- [fol. 44] strument reported by me to the State Board included the so-called talking set, consisting of the receiver, transmitter and induction coil. I reported all the talking sets in Los Angeles County in the reports to the State Board to which I have referred.

So far as the questions in this case are concerned, the amended reports and the original reports were the same.

In item 10, heretofore mentioned, is the word "Poles." That word includes such things as the poles themselves, cross-arms, braces, balconies, steps, anchors, anchor rods, guy wires and insulators. The item "Conduits" covers such items as the various types of conduits, iron conduits, clay conduits, man holes, man hole covers, ladders in the man holes and entrance vaults. Many of these entrance vaults are elaborately constructed. They are tiled and lighted and include considerable underground work.

Here the plaintiffs offered in evidence as their Exhibits 1 and 2 the amended reports of operative property, filed by the plaintiffs Southern California Telephone Company and The Pacific Telephone and Telegraph Company, respectively, with the State Board of Equalization in June, 1925, which had been referred to by the witness. It was stipulated that for all purposes of this case the said amended reports and the original reports filed with the State Board by the two plaintiffs in March, 1925, were the same. Exhibits 1 and 2 are, by stipulation, filed in the Circuit Court of Appeals as original exhibits.

[fol. 45] The Witness (continuing): I hold in my hand an instrument commonly known as a telephone or telephone set. It includes a transmitter, receiver and induction coil and considerable wiring and cords, all mounted in a box. The whole thing is a telephone instrument. Each part of it that I have enumerated, particularly the transmitter, receiver and induction coil, is an integral and essential part of the instrument necessary to its use. The set which I have in my hand and to which I have referred is a wall set and the instrument is a wall instrument.

I now produce the other kind of instrument which is commonly used. In my right hand I hold that part of it commonly known as the bell box, consisting of a bell, condenser and induction coil, suitably connected with wires and cords. In my left hand I hold what is commonly known as a desk stand, consisting of a transmitter, receiver, calling device and a stand or support.

With respect to this latter kind of instrument, the convenience of the patron or subscriber is consulted. If he prefers to have the stand with the receiver and transmitter in one place and the box with the induction coil, condenser and bell in another, we separate them, but they are connected by means of a wire. It is, however, one instrument, the same as a wall set, and each part of it, as I have testified in connection with the wall set, is necessary to the use of the telephone.

[fol. 46] The different parts which I have just described to the court are the instruments as I returned them to the State Board of Equalization.

The defendants having stated that they desired no cross-examination, the witness was excused.

Offer in Evidence

The plaintiffs thereupon offered in evidence fifty tax bills, sent out by the assessor of the County of Los Angeles on behalf of the municipalities mentioned in the amendment to plaintiffs' complaint. These bills were received and collectively marked as Plaintiffs' Exhibit 3. By stipulation this exhibit is filed in the Circuit Court of Appeals as an original exhibit.

Thereupon the following took place:

Mr. Sutro: If your honor please, I have furnished Mr. Tucker, and he has courteously agreed we may make, if it is material, without production of proof, a statement of the taxes paid by these two Companies for the fiscal year ending June 30, 1925, and the first half of the taxes for the fiscal year ending June 30, 1926, which has been paid, and showing the second half which will have to be paid next April. I will just briefly state to your honor that for the

year 1924-1925 the two Companies together paid in gross receipts taxes to the State $2,080,005.72; that for the fiscal year ending June 30, 1926, the current fiscal year, they will have paid to the State $2,340,075.12; that they have to date already paid of that sum $1,170,037.57.

[fol. 47] Mr. Tucker: We object to the introduction of the testimony on the ground it is immaterial.

Mr. Sutro: I will tell you why, Mr. Tucker, it is perfectly material. It is alleged in the bill of complaint that we pay a portion of our gross receipts to the State of California for our taxes but at the time the complaint was drawn it had not been figured by the State Board and we couldn't set it up. If it had been we would have known it. So we have to supplement the allegations of the complaint to that extent by this evidence, and I don't conceive that it could do any possible harm.

The Court: It may be received.

Mr. Sutro: That is all the evidence we have.

Mr. Tucker: We have no evidence, your honor.

Thereupon the following stipulations were made between the parties:

STIPULATION OF FACTS

First. That all the allegations of the amendment to plaintiffs' complaint are admitted, except in so far as the same contain conclusions of law, and that all conclusions of law in the said amendment may be deemed denied.

Second. That plaintiffs, on or about October 26, 1925, made inquiry at the auditor's office and of the treasurer of the County of Los Angeles as to the portion of the tax shown by the several tax bills in Exhibit 3 which belonged to each respective municipality named therein and were informed, "We can't tell you yet," and that plaintiffs made [fol. 48] further inquiry at said offices as to the amount to be deducted as expenses of the county for collection of said taxes and were informed, "We can't tell you."

Third. That this cause may be submitted for decision as follows: Upon defendants' motion to dismiss and, in the

event that said motion should be denied, then, without further hearing, for final determination upon the application of plaintiffs for a permanent injunction as prayed in their complaint.

The foregoing constitutes a full and complete statement of all the evidence, documentary and oral, offered or presented upon the hearing of the above entitled cause and of all the proceedings had thereon.

The foregoing is presented by appellants as and for their statement for use upon their appeal.

Dated March 10th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

STIPULATION RE STATEMENT OF EVIDENCE

It is hereby stipulated by and between the parties hereto that the foregoing statement is a true, complete and properly prepared statement of the evidence, adduced upon the hearing of the above entitled cause; omitting only parts thereof not essential to the decision of the questions presented by the appeal, and it is further stipulated that the [fol. 49] same may be approved by the above entitled court as the statement of evidence to be used on such appeal.

Dated March 10th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel; J. A. Tucker, Deputy County Counsel; Albert W. Leeds, Deputy County Counsel, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement on stipulation of parties is hereby found to be a true, complete and properly prepared statement of the evidence adduced upon the trial of the

above entitled cause and of all the proceedings had thereon, and as such it is hereby approved.

Dated March 11th, 1926.

Edward J. Henning, District Judge.

[File endorsement omitted.]

[fol. 50] In United States District Court

Order Granting Motion to Dismiss—Filed February 3, 1926

This matter comes before the Court on the motion of the defendants to dismiss the plaintiff's bill of complaint for the reason that, as alleged, the bill does not state facts sufficient to entitle plaintiffs to the relief sought, that the bill does not state facts entitling plaintiffs to injunctive relief because they have a plain, speedy and adequate remedy at law, and for want of jurisdiction in this Court.

Upon argument on the motion the facts were stipulated, and by stipulation the case was submitted for decision in the event the motion to dismiss was denied.

The case is one of unusual interest and has been presented with great ability on the part of both sides to the controversy, and in great detail. I have reached the conclusion that I cannot entertain the suit. This conclusion is arrived at somewhat reluctantly, because to me the merits seem so plain.

With all due deference to the learned Judge who has held differently, I am not persuaded that the inability to collect interest on a tax paid under protest is denial of an adequate remedy at law in a case of this nature. The Courts of the State of California are open to the plaintiff, and ultimately the Courts of the United States may be.

This suit involves very important interests to both parties, as well as important legal principles. It seems to me of the utmost importance to all concerned, including [fol. 51] the American people, that the proper corelation of the Courts of State and Nation is of greater importance than any direct issue here involved. I feel that this Court

might take jurisdiction, but I am not persuaded that it would be error not to do so. For that reason, I believe the matter should be left to the Courts of the State of California.

Defendants' motion to dismiss the bill of complaint is granted.

Dated this 3rd day of February, 1926.

Edward J. Henning. Edward J. Henning, U. S. District Judge.

[File endorsement omitted.]

[fol. 52] In United States District Court

[Title omitted]

Minute Entry—February 3, 1926

This cause having come before the court for hearing on the order to show cause why the preliminary injunction prayed for in plaintiff's bill of complaint should not issue and on the motion of the defendants to dismiss the plaintiff's Bill of Complaint, testimony having been taken, evidence introduced and the court having heard the arguments of counsel for the respective parties, having been submitted on briefs to the court for decision, and the court having fully considered the same, on consideration whereof, it is ordered that the defendants' motion to dismiss the bill of complaint be and the same hereby is granted. Counsel for the defendants will prepare the appropriate decree, in accordance with the opinion handed down and filed this date. At the request of the plaintiffs, the restraining order is continued in effect pending appeal to the United States Circuit Court of Appeals.

[fol. 53] IN UNITED STATES DISTRICT COURT

No. J-16-H

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a Corporation, and The Pacific Telephone and Telegraph Company, a Corporation, Plaintiffs,

vs.

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a Body Corporate and Politic, Defendants

A decree is presented to the court in this cause at this time for signature, and said decree having been signed by the court, is ordered filed and entered herein, said decree as filed being as follows, to wit:

DECREE—Filed March 2, 1926

This cause came on to be heard before the court on the order to show cause why the preliminary injunction prayed for in plaintiffs' bill of complaint should not issue and on [fol. 54] the motion of the defendants to dismiss plaintiffs' bill of complaint, and was argued by counsel, Messrs. Lawler & Degnan and Alfred Sutro, Esq., appearing for plaintiffs and Edward T. Bishop, County Counsel, and J. A. Tucker and Albert W. Leeds, Deputies County Counsel, appearing for the defendants.

On argument of said motion, facts were stipulated, testimony taken and evidence introduced, and by stipulation the cause was submitted for decision as follows: Upon said motion to dismiss, and in the event the said motion should be denied, then without further hearing, for final determination upon the application of plaintiff for a permanent injunction as prayed in the complaint.

And, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

That defendants' motion to dismiss plaintiffs' bill of complaint be granted and that the temporary restraining order heretofore issued herein be continued in full force and effect pending an appeal by plaintiffs to the United States Circuit Court of Appeals, or until the time provided by law for such appeal shall have expired, and that defendants have and recover from the plaintiffs, Southern California Telephone Company, a corporation, and the Pacific Telephone and Telegraph Company, a corporation, their costs and disbursements incurred herein amounting to the sum of $25.

[fol. 55] Dated this 2 day of March, 1926.

Edward J. Henning, Judge.

Approved as to form: Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

Decree entered and recorded Mar. 2, 1926.

Chas. N. Williams, Clerk, by Edmund L. Smith, Deputy Clerk.

[File endorsement omitted.]

In United States District Court

Stipulation re Exhibits—Filed March 11, 1926

It is hereby stipulated by and between the parties to the above entitled suit that Plaintiffs' Exhibits 1, 2 and 3, offered in evidence upon the hearing of the above entitled cause, may be sent up on appeal to the Circuit Court of Appeals for the Ninth Circuit as original exhibits and need not be copied in the transcript of the record on appeal.

Dated March 11th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel; J. A. Tucker, Deputy County Counsel; Albert W. Leeds, Deputy County Counsel, Attorneys for Defendants.

[fol. 56] It is so ordered this 11th day of March, 1926.

Edward J. Henning, District Judge.

[File endorsement omitted.]

In United States District Court

Petition for Appeal

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation, plaintiffs in the above entitled cause, feeling aggrieved by the decree of record and entered in said cause on the 2nd day of March, 1926, do, and each of them does, hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the rules of said court.

Inasmuch as in and by said decree the temporary injunction or restraining order heretofore issued by the above entitled Honorable Court in this cause has been continued in full force and effect pending an appeal by plaintiffs to the United States Circuit Court of Appeals, or until the time [fol. 57] provided by law for such appeal shall have expired, your petitioners hereby tender a bond for the continuance of said injunction or restraining order in such amount as the court may think proper for the security of the rights of the opposite parties, and your petitioners pray that with the allowance of this appeal an order be made and entered fixing the amount of such bond.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

In United States District Court

Order Allowing Appeal—Filed March 11, 1926

The appeal prayed for in the foregoing petition is hereby allowed upon a bond being given, as required by law, in the sum of $500.

It is hereby further ordered that said plaintiffs give a bond in the sum of $10,000.00 for the continuance of the

temporary injunction or restraining order herein, as ordered in the decree herein, which bond the court considers proper and hereby finds to be proper for the security of the rights of the opposite parties, in accordance with Equity Rule 74.

Dated March 11th, 1926.

Edward J. Henning, District Judge.

[File endorsement omitted.]

[fol. 58] In United States District Court

Assignments of Error—Filed March 11, 1926

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation, plaintiffs and appellants herein, contend that in the record, opinion, decision and final decree in this cause there is manifest and material error, and said plaintiffs and appellants now make, file and present the following assignment of errors on which they rely, to wit:

I

The District Court erred in rendering and entering the final decree herein dated March 2nd, 1926.

II

The District Court erred in granting the motion of the above named defendants and appellees to dismiss the complaint herein.

III

The District Court erred in not making, rendering and entering a final decree granting to plaintiffs a permanent injunction and the other relief prayed in the complaint herein.

IV

The District Court erred in holding and deciding that it had no jurisdiction of this cause.

V

The District Court erred in holding and deciding that plaintiffs have an adequate remedy at law for the matters [fol. 59] and things alleged and complained of in said complaint as amended.

VI

The District Court erred in holding and deciding that this cause is not within the jurisdiction of a court of equity.

VII

The District Court erred in holding and deciding that the inability to collect interest on a tax paid under protest is not a denial of an adequate remedy at law in a case of this nature.

VIII

The District Court erred in not holding and deciding that plaintiffs have no adequate remedy at law for the matters and things complained of herein, for the reason that, under the law of California, plaintiffs, even if they could pay under protest the alleged tax in said complaint mentioned and sue to recover the same, could not recover interest on the tax so paid.

IX

The District Court erred in not holding and deciding that plaintiffs have no adequate remedy at law, for the reason that substantial parts of said alleged tax are to be collected for the benefit of and turned over to sixteen separate municipalities.

X

The District Court erred in not holding and deciding that any possible remedy of plaintiffs under the state law by paying the said alleged tax and maintaining suit for its re- [fol. 60] covery is too doubtful to be an adequate remedy.

XI

The District Court erred in not holding and deciding that any remedy which would require the plaintiffs to pay the

tax in suit, as a condition to litigating its validity, is an inequitable and inadequate remedy.

XII

The District Court erred in not holding and deciding that the case involves a federal question, by reason of which, since the amount involved exceeds $3,000., the District Court had and should take jurisdiction.

XIII

The District Court erred in not holding and deciding that, inasmuch as the case involves a federal question and the amount involved, exclusive of interest and costs, exceeds $3,000., the jurisdiction of the District Court extends to all questions in the case, including questions of state law.

XIV

The District Court erred in holding and deciding that it could refuse jurisdiction of this case.

XV

The District Court erred in holding and deciding that it was within its discretion whether or not to exercise jurisdiction in this case.

XVI

The District Court erred in holding and deciding that the determination of the questions raised in the case should be left to the courts of the State of California.

[fols. 61 & 62] Wherefore, plaintiffs and appellants pray that said decree be reversed and that said District Court be directed to enter a decree in favor of plaintiffs for the relief prayed in the complaint as amended.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs and Appellants.

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed March 11, 1926, omitted in printing.

[fols. 63-65] Bond on injunction for $10,000, approved and filed March 11, 1926, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the clerk of the above-entitled court:

SIR: Please prepare a transcript of the record upon the appeal of the above named plaintiffs in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, and incorporate therein the following:

1. Bill of complaint for an injunction.
2. Amendment to said complaint.
3. Answer to said bill of complaint.
4. Defendants' notice of motion to dismiss.
5. Defendants' motion to dismiss plaintiffs' bill of complaint.
6. Bond on temporary restraining order.
7. Order to show cause and restraining order.
8. Return of defendants to order to show cause for injunction.
9. Stipulation continuing hearing upon order to show cause.
10. Statement of the evidence, together with stipulation and order approving the same.
11. Opinion of the court, dated February 3, 1926.
12. Minute order dated February 3rd, 1926, directing that the decision be filed and decree entered.
13. Final decree dated March 2nd, 1926.
14. Stipulation regarding exhibits.
15. Petition for appeal and order allowing same, and fix-
[fol. 67] ing amount of bond for continuance of injunction.
16. Assignment of Errors.
17. Citation on appeal.

18. Bond on appeal and stipulation and order approving the same.

19. Bond for continuance of injunction and stipulation and order approving the same.

20. Certificate of the clerk of the above entitled court to record on appeal.

21. Any and all stipulations or orders hereafter filed extending time to file or docket record on appeal.

22. This præcipe.

Dated March 11th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

[fol. 68] In United States District Court

Stipulation re Transcript of Record—Filed March 11, 1926

It is hereby stipulated that the portions of the record referred to in the foregoing præcipe may be incorporated in the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the above entitled District Court in the above entitled cause, and that the same may be certified as such. The clerk of said District Court is hereby requested to prepare and certify such transcript, omitting the titles of files and records and inserting in lieu thereof the words "Title of Court and Cause."

Dated March 11th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel; J. A. Tucker, Deputy County Counsel; Albert W. Leeds, Deputy County Counsel, Attorneys for Defendants.

[File endorsement omitted.]

[fols. 69-72] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] [Caption omitted]

[fol. 74] Minute entry of argument and submission May 10, 1926, omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

No. 4811

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a Corporation, and The Pacific Telephone and Telegraph Company, a Corporation, Appellants,

[fol. 75] vs.

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a Body Corporate and Politic, Appellees

ORDER TO FILE OPINION AND DECREE—June 7, 1926

By direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rudkin, Circuit Judges, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed therein.

[fol. 76] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Before Gilbert, Hunt, and Rudkin, Circuit Judges

Opinion—Filed June 7, 1926

Hunt, Circuit Judge:

This is an appeal from a decree dismissing a complaint, the object of which was to secure an injunction restraining the seizure and sale of more that 300,000 telephone talking sets in satisfaction of a local tax.

[fol. 77] Plaintiffs, California corporations, allege that since 1911 they have paid annually to the State of California in lieu of other taxes on their operative property—that is all property used by plaintiffs in the telephone business—a fixed percentage of the gross receipts from their business. Further facts alleged are: In 1925 plaintiffs had upwards of 300,000 telephone instruments in use in Los Angeles County. A telephone instrument consists of a receiver, a transmitter, an induction coil, a stand (in case of a desk telephone) or a body (in case of a wall telephone) and the necessary wiring. Plaintiffs do not own the talking sets but lease them from the American Telephone and Telegraph Company, a New York corporation. In April, 1925, the assessor of Los Angeles County assessed against the American company personal property taxes of over $52,000 on the talking sets, that is, upon receiver, transmitter and induction coil. The American company failed to pay the tax, whereupon the assessor threatened to seize and sell the talking sets. It is alleged that under the Constitution and laws of California the gross receipts tax required precludes the imposition of any other tax upon the property used in the business of plaintiffs; that the tax involved is without warrant in law; that it would result in double taxation, which is expressly forbidden by the laws of California; that no other property in California is taxed twice and that the threatened seizure and sale would disrupt and paralyze the telephone business within Los Angeles County, thereby de-

[fol. 78] nying plaintiffs the equal protection of the law and taking their property without due process of law, in

violation of the Fourteenth Amendment; that plaintiffs have reported their instruments, including the talking sets, to the California State Board of Equalization as operative property, and have paid, or assert a willingness and ability to pay gross receipts taxes to the state.

The defendants answered and moved to dismiss, upon the grounds of lack of jurisdiction, that plaintiffs had an adequate remedy at law by paying the tax and suing to recover, and that the tax was valid.

After hearing a limited amount of evidence the case was submitted on motion to dismiss, and in the event of denial of that motion, then without further hearing, on application of plaintiffs for permanent injunction.

The argument before us was upon these questions:

1. Does the complaint raise a federal question under the Fourteenth Amendment? 2. Are plaintiffs without an adequate remedy at law? 3. Is the tax invalid under the laws of California? 4. Is the tax invalid under the Fourteenth Amendment?

The case, we think, turns largely upon the construction of section 14, Article XIII of the state Constitution and certain statutes hereinafter cited.

Section 14 of Article XIII, omitting enumeration of other public utilities than telephone companies, provides in part as follows:

"Sec. 14. Taxes levied, assessed and collected as hereinafter provided, upon * * * telephone companies [fol. 79] * * * and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. * * *

(a) * * * all telegraph and telephone companies * * * shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentage hereinafter fixed upon the gross receipts from operation of such companies, and each thereof with this state.

* * * * * * *

Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided.

(f) All the provisions of this section shall be self-executing and the legislature shall pass all laws necessary to carry this section into effect.

Section 3665-b of the Political Code defines operative property, on which, under the above quoted constitutional provisions, the gross receipts tax is "in lieu of all other taxes and licenses, state, county and municipal." Operative property of telephone companies includes (subdivision d):

[fol. 80] "The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings."

Subdivision e of the same section provides:

"* * * * The operative property of the companies enumerated in this section shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section three thousand six hundred sixty-four a of this code."

We are at once directed to a clear understanding of the system of taxation of telephone companies in California by the decision of the Supreme Court in San Francisco vs. Pacific Telephone and Telegraph Co., 166 Cal. 244, where it is shown that the larger purpose of changes wrought by the constitutional amendment, heretofore quoted, was division of the subjects of state and local taxation by imposing upon corporations engaged in certain callings the obligation to pay certain taxes to be applied exclusively to state purposes, and by making provision that persons en-

gaged in, and the property employed in a public service corporation are, to a greater or less degree, to be free from [fol. 81] the burden of local taxation. With respect to telephone companies provision is made for taxes measured by given percentages of gross receipts, the taxes so imposed to be in lieu of all other taxes and licenses, state, county and municipal, upon the property of the corporation in question. The Court further pointed out that the new method under which the taxes are collected exclusively for the state was substituted for former ways, and that the percentages imposed by the amendment "supersede not only other taxes upon the property, but also license fees like those exacted by the ordinances of the city and county." These views were followed in Hartford Fire Insurance Co. vs. Jordan, 168 Cal. 270, where it was again held that the effect of the amendment was to supersede the prior state license tax act so far as it applied to the insurance company. (Pullman Company vs. Richardson, 261 U. S. 330.)

We do not understand that defendants would controvert the proposition to this extent: that the effect of the amendment was to supersede prior taxes and that the talking sets are operative property, and that if they were owned by plaintiffs they could not be assessed. They do insist, however, that the language "their * * * poles * * * wires and other property, or any part thereof used exclusively in the operation of their business in this state" should be construed with relation to the general scheme of taxation in California, which they urge is based upon the principle that the owners of property shall pay taxes. They proceed by arguing that the in lieu clause of sub- [fol. 82] division "a" of the amendment as pertinent to the property "of such companies" is a relief to the public utilities from payment of further taxes on *their* property (italics ours), but not upon property leased and used by such companies. We are constrained to regard the contention as against the real meaning of the amendment and the relevant statutes.

In ascertaining whether actual use of the sets in the business, rather than underlying ownership of them, is the proper criterion by which taxation shall be imposed, we refer to certain statutory requirements. The California Political Code requires that each public utility shall file an

annual report with the State Board of Equalization in such detail as the board shall prescribe, showing, among other things, its operative property. The board must provide for the assessment of the gross receipts tax—in case of telephone companies 5½ per cent of the gross receipts for the preceding calendar year. (Secs. 3665a and 3665-c.)

Upon the argument we were told that for many years these plaintiffs have made the necessary reports in which were included the talking sets (leased from another corporation) as an integral part of the instruments, and the Board of Equalization has assessed gross receipts taxes ($— for the year 1925-1926). Thus in prior practical custom the talking sets have been regarded as operative property, subject to taxation to plaintiff.

In San Bernardino County vs. State Board of Equalization, 172 Cal. 76, the Supreme Court said: "The prime [fol. 83] requisite for property properly classed as 'operative' is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision 'a' of section 14, Article XIII of the Constitution," and that the exertion of the local taxing power in all of the cases included "not the quality or the nature of the property so much as its use." This decision harmonizes with the view that the scheme of taxation laid out in the amendment rests upon the intention to fix the contribution of a telephone company to the revenues of the state by the earnings of its plant, used as an entirety. While courts will not concern themselves with the economic policy pervading a state statute, they may properly consider that in taxing gross receipts upon all operative property in use there is really a payment of a substitution tax upon the whole value of the property in use. (Trimble vs. Seattle, 231 U. S. 683; San Pedro R. Co. vs. Los Angeles, 180 Cal. 18; Pullman Company vs. Richardson, 185 Cal. 484.)

Questions of assessment and taxation of operative property leased and operative property held in fee have been before the courts in several instances. Difference in the phraseology of the statutes of the several states may lessen the value of the decisions as authorities in the present case, but the reasoning of the courts is quite apposite. Merrill Railway vs. City of Merrill, 119 Wis. 249, was a case where the city assessed land leased to the street railway company.

The state statute required gross receipts taxes on street railways and provided that all property "owned and actually and necessarily used by such corporation in the opera-[fol. 84] tion of its business shall be exempt from taxation and other license fees." In a suit the railway company joined the lessors of certain property used by the street railway to have the tax declared void. The Court held that the tax was improperly assessed and rested decision upon the ground that the whole purpose of the scheme of taxation was to measure the contribution of street railways and public revenues by the earning capacity of their plants as entireties, and regarded leased property as falling within the purpose of the exemption as readily as that which was owned absolutely, while the property was actually used for the purposes of the enterprise. The Court said: "What difference would it make that the power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto of this particular property. Why should the legislators care whether the dynamos in the power-house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded." City of Superior vs. Allouez Bay Dock Co. (Wis.), 164 N. W. 362.) In People ex rel. Collector vs. Wiggins Ferry Co. (Ill.), 100 N. E. 956, a railroad company reported a portion of its right of way which it held under lease from the defendant. The land was assessed to defendant and in due course the assessor obtained judgment for local taxes upon the land. The Supreme Court considered the statute of the state which required railroad companies to file with the State Board of Equaliza-[fol. 85] tion sworn schedules of their tracks, and held that the mere fact that the appellant owned the fee and that the railroad was in possession under lease or otherwise did not authorize the assessor to assess the right of way. "Real estate used by a railway company for a right of way," said the Court, "is railroad track for the purposes of assessment, and is assessable only by the State Board of Equalization even though the railroad company is a tenant by sufferance or has a lease and the title to the land is owned by another corporation or individual." In People vs. Illinois, Northern R. Co. (Ill.), 94 N. E. 37, the

Court, after setting forth that the jurisdiction of the Illinois State Board of Equalization was exclusive over the class of property designated as railroad track for assessment purposes, whether held by a railroad company in fee or for years or otherwise, said: "In other words, that the use to which the property is devoted, and not where the fee title rests, determines which of the assessing bodies—that is, the State Board of Equalization or the local assessor—shall assess property in use by the railroad company for right of way purposes." (People vs. Terre Haute (Ill.), 100 N. E. 173.)

Upon the point of jurisdiction we are aided by the highest authority. In Green, Auditor, vs. Louisville etc. Co., 244 U. S. 499, the railroad companies brought suit against the members of the Kentucky Board of Valuation and Assessment and the legal officers of the state to enjoin them from certification and enforcement of certain state franchise taxes assessed under the Kentucky statutes. It was [fol. 86] alleged that the state officials had discriminated against plaintiffs by assessing their intangible property at a rate higher than that employed by other taxing authorities of the state in assessing similar property. Jurisdiction was invoked under the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs also asserted that the threatened action of the defendants was in violation of the uniform taxation provisions of the Constitution of the State of Kentucky. Jurisdiction was held in the federal court, the Supreme Court saying that the contention that the action of the Board of Valuation and Assessments referred to in the complaint and the threatened action of the local government authorities in respect to carrying the assessments into effect, constituted action by the state, and if carried out would violate the equal protection provision of the Fourteenth Amendment, and that there was a real and substantial controversy presented under the Constitution of the United States which conferred jurisdiction upon the federal court irrespective of the citizenship of the parties. The Court further held that as jurisdiction existed, it extended to the determination of all questions involved in the case, including the question of state law, "irrespective of the disposition that may be made of the federal question or whether it be found necessary to decide it at all." Ray-

mond, Treasurer, vs. Chicago Traction Co., 207 U. S. 20, was cited. In that case suit was brought to enjoin the treasurer of Cook County, Illinois, from taking further proceedings toward the collection of certain taxes assessed [fol. 87] against the traction company upon an assessment alleged to be in violation of the Fourteenth Amendment, which, if enforced, would result in the taking of property without due process of law and in denying it the equal protection of the law. There was no allegation of diversity of citizenship. The Supreme Court held that the action of the State Board of Equalization and Assessment in assessing property of the traction company was the action of the state, and that as it appeared that if it were carried out the provisions of the Fourteenth Amendment would be violated by taking property without due process of law and by failing to give equal protection of the law, a federal question was presented "beyond all controversy."

Respondents cite Barney vs. New York, etc., 193 U. S. 430, as supporting the argument that all possible remedies under the state law must be exhausted before plaintiffs are entitled to relief in the federal courts. But the force of the Barney case has been greatly weakened by the discussion in Home Telephone Company vs. County of Los Angeles, 227 U. S. 278, where there was no diversity of citizenship alleged. The Telephone Company sued to enjoin the enforcement of a rate fixing ordinance on the ground that the ordinance was contrary to the Fourteenth Amendment. Defendant answered that the ordinance, if contrary to the Fourteenth Amendment, was contrary to similar provisions of the state Constitution, and that the Telephone Company must proceed under the state law. The Court, speaking through Chief Justice White, said: [fol. 88] "That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." The Barney case, supra, was expressly held to have been

so distinguished or qualified by the Raymond case, supra, as not to be even persuasive in the argument that the federal court will not interfere merely because of a contention that it is the duty of the plaintiff to exhaust all possible remedies under the state law before he is entitled to relief in the federal court. Other cases might be cited, but those selected are authority for holding that a federal question is presented.

Palintiffs aver that they have no adequate remedy at law for the reason that upon payment of the tax they could recover, if at all, only by a multiplicity of suits against the defendant county and sixteen municipalities from which the tax is collected, that no interest on the tax could be recovered, and that it was doubtful whether plaintiffs, not being owners of the talking sets, could maintain an action under the statutes of California.

Parts of the tax in suit, if collected by Los Angeles county, would be for the benefit of and turned over to sixteen separate municipalities. (Cal. Stats. 1895, p. 219, as [fol. 89] amended; Deering's Gen. Laws, 1925, Vol. II, p. 3531.) Under that act a tax rate is fixed by each municipality and municipal taxes are to be collected at the same time and in the same manner as county taxes, and when collected are to be paid to the treasurer of the municipal corporation to which the tax belongs, under the general requirements provided by law for the settlement of other taxes. By a general law of the state a tax collector must pay all the taxes in his hands to the county treasurer on the first Monday of each month and make such payment at least once a month and oftener, in his discretion. (Cal. Pol. Code, secs. 3753 and 4126.) Under section 1, Act of March 27, 1895, supra, as amended, a municipality may at any time withdraw from the arrangement whereby the county collects its taxes.

Section 3804 of the Political Code provides that any taxes erroneously or illegally collected may, by order of the board of supervisors, be refunded by the county treasurer, and whenever payment shall have been made to the state treasurer by the county treasurer, as provided by sections 3865 and 3866 of the Political Code, and it shall afterwards appear to the satisfaction of the board of supervisors that a portion of the moneys so paid should be refunded as pro-

vided in the section, the board may refund such portion of the taxes, penalties and costs so paid to the state treasurer to the person paying the same out of the general fund and shall thereafter report the same to the proper authorities and in the next settlement between the county treasurer and the comptroller, the comptroller, if satisfied of the [fol. 90] legality of such refunding by the board, shall give the treasurer credit for the state's portion of the amounts so refunded as prescribed in section 3871 of the code. Under section 3819, Political Code, at any time after the assessment book has been received by the tax collector and the taxes have become payable, the owner of any property assessed therein who may claim that the assessment is void, may pay the tax to the tax collector under protest in writing, specifying whether the whole assessment is claimed to be void, or if a part only, what portion; and such owner may within six months bring action against the county in the superior court to recover the tax so paid under protest, and if it be adjudged that the assessment or any part thereof referred to in the protest was void on a ground specified in the protest, judgment shall be entered against the county therefor. On the payment of any such judgment such part of the tax recovered thereby as may have been paid by the county treasurer into the state treasury shall be regarded as an amount due the county for the state and shall be deducted in the next settlement had by the county and the state.

It is doubtful whether these plaintiffs, not being "owners" of the property assessed, could obtain relief under section 3819. (Warren vs. City and County of San Francisco, 150 Cal. 167.) It may be that recovery could be had under section 3804 as construed in Hayes vs. County of Los Angeles, 99 Cal. 74, where it was held that where the public interest or private right requires that a thing shall be done, the word "may" is generally construed to [fol. 91] mean "shall," and that the board of supervisors are empowered to refund, and in Steward Law & Collection Co. vs. Alameda, 142 Cal. 660, where in an action based on section 3804, taxes were illegally assessed and claim was presented to the board for refund and was refused, the Court held that the statute furnished a summary remedy authorizing a refund. It was also held that section 3804

was intended to give relief without the necessity of resorting to the courts while 3819 was meant to afford a remedy in certain cases through the courts, but that the remedies furnished by the sections were independent and not to be regarded as exclusive.

Plaintiffs argue, however, that 3804 is not applicable where a lessee claims that the assessment is void in whole or in part. That question does not seem to have been directly decided, and in the absence of a positive ruling by the Supreme Court of the state, of course, no construction by us could settle the point. Again, if plaintiffs should pay the taxes in suit there would seem to be no certain way of obtaining complete refund except by suits against the county and the various municipalities. This would require plaintiffs to bring many suits, and in the event of recovery there would be no provision by which plaintiffs could recover the sums allowed the counties for the costs of collection.

It is well established that where adequate remedy at law is not clear, and equity can furnish relief, a plaintiff ought not to be compelled to take the chance of obtaining relief at [fol. 92] law. (Davis vs. Wakelee, 156 U. S. 680; Atlantic Coast Line vs. Daughton, 262 U. S. 413.)

The collection of interest is entitled to special consideration. By the laws of California one who recovers a wrong fully collected tax, paid under protest under section 3819, cannot recover interest until after judgment (Engbretson vs. San Diego etc., 185 Cal. 475; Spencer vs. Los Angeles County, 180 Cal. 115). In Birch vs. Board of Supervisors, 191 Cal. 235, the Supreme Court, reviewing an order of the superior court where proceedings presented the validity of an order of the supervisors increasing an assessment upon the property of plaintiffs, held that the petitioner, not being entitled to recover interest upon the increased tax, had no adequate remedy by suit to recover the tax.

In Proctor and Gamble Distributing Co. vs. Sherman, 2 F. (2) 165, plaintiff brought suit to enjoin the Attorney General of the state and members of a state commission from collecting certain corporation taxes on the ground that the defendants in calculating the taxes ignored the distinct entities of the plaintiff and its subsidiaries. The

officials set up that the plaintiff had an adequate remedy at law by paying the tax and bringing suit to recover. It was held that an express refusal to allow interest was a denial of an adequate remedy. Judge Hand said: "While I have been referred to no decision on this point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how [fol. 93] long after, he establishes that he ought never to have been required to pay it at all."

The conclusion we draw from the language of the Constitution and the statutes is that the gross receipts tax is a proper tax on the talking sets and that the levy threatened by the local authorities would result in the imposition of a double tax on the same property, effected not merely by a mistake, but with intent to adopt as a practice an unlawful discrimination, and that remedy by injunction will lie. (Chicago G. W. R. vs. Kendall, 266 U. S. 94.)

As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion, and left a bounden duty to proceed to a decree. (Cohen vs. Virginia, 6 Wheat. 264; Willcox et al. vs. Con. Gas Co., 212 U. S. 19; Kline vs. Burke Con. Co., 260 U. S. 226.)

The decree will be reversed, and the cause remanded with directions to proceed with the case and to grant injunction prayed for by plaintiffs.

Reversed and remanded.

[File endorsement omitted.]

[fol. 94] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Appeal from the District Court of the United States for the Southern District of California, Southern Division

Decree—Filed June 7, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Southern Division and was duly submitted.

[fol. 95] On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellants and against the appellees, and that this cause be, and hereby is remanded to the said District Court with directions to proceed with the case and to grant the injunction as prayed for by plaintiffs.

It is further ordered, adjudged and decreed by this Court that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 96] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—July 12, 1926

On consideration of the petition, filed July 6, 1926, on behalf of the appellees for a rehearing of the above-entitled cause, and of the appellants' reply to appellees' petition for rehearing, filed July 8, 1926, and good cause therefor appearing, it is ordered by direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rud-

kin, Circuit Judges, before whom the cause was heard, that the said petition for rehearing be, and hereby is denied.

[fols. 97 & 98] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 29, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 133.

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic,

Petitioners,

vs.

Southern California Telephone Company (a corporation), and The Pacific Telephone Company (a corporation),

Respondents.

STIPULATION.

It is hereby stipulated by and between plaintiffs and defendants herein through their respective attorneys as follows:

I.

That the references to the transcript on file in the Supreme Court of the state of California in *Birch v.*

Board of Supervisors, reported in 191 Cal. 235 (Records of the Supreme Court, state of California, L. A. 7168), appearing on page 94 of brief for petitioners after granting of writ of *certiorari* on file herein, are true and correct statements of the matter contained in such transcript.

II.

That the quotation from page 32 of respondents' reply brief filed in *Birch* v. *Board of Supervisors*, reported in 191 Cal. 235 (Records of Supreme Court of the state of California, L. A. 7168), appearing on pages 94-5 of brief for petitioners after granting of writ of *certiorari* on file herein, is a true and correct copy of the matter so quoted from page 32 of said respondents' reply brief.

III.

That the quotation from the argument in favor of the adoption of the amendments to the California Constitution at the election of 1910, signed by J. B. Curtin, state senator, appearing on pages 152-3 of brief for petitioners after granting of writ of *certiorari* on file herein, is a true and correct copy of the portion of said argument so quoted.

Dated this 10th day of November, 1927.

Everett W. Mudlow

W. Lawrence Holbrook

Attorneys for Petitioners.

Lawler & Degnan

Pillsbury, Madison & Sutro

Attorneys for Respondents.